89-1345

Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

BEVERLY HILLS SAVINGS & LOAN ASSOCIATION, SOUTHLAND CORPORATION,

Petitioners,

vs.

MELVIN MEMPHREY CARTER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Ninth Circuit decision below has held that a judgment is not effective under Fed.R.Civ.P. 58 and the time for appeal does not begin to run unless and until a separate document bearing the title "judgment" or "order" is prepared and signed by the *same* deputy clerk, entered in the docket and mailed to all parties.

The question presented is whether the Ninth Circuit has exceeded its authority by adding technical recordkeeping requirements to Rule 58 which are inconsistent with both the text and the purposes behind the rule and which cannot be reconciled with the controlling precedent in the Ninth Circuit as well as several other circuits.

RULE 29.1 STATEMENT

Beverly Hills Savings and Loan Association is the predecessor to Beverly Hills Savings which is the predecessor to Beverly Hills Federal Savings Bank. The parent company of Beverly Hills Federal Savings Bank is Michigan National Corporation. The subsidiaries of Beverly Hills Federal Savings Bank are BH Mortgage Corporation, BH Asset Holding Corporation, BHS Insurance Services, Inc., BHS Service Corporation and Southland Company.

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No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1989

BEVERLY HILLS SAVINGS & LOAN ASSOCIATION, SOUTHLAND CORPORATION,

Petitioners,

vs.

MELVIN MEMPHREY CARTER,

Respondent.

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Opinion of the court of appeals (Pet. App. A) is reported at 884 F.2d 1186 (9th Cir. 1989) (hereinafter "Opinion"). The order of the court of appeals denying the petition for rehearing en banc (Pet. App. B) is not reported. The minute order of the district court dismissing the action (Pet. App. C) is not reported. The minute order of the district court denying respondent's motions to reopen the action and for a preliminary injunction (Pet. App. D) is not reported. The order of the court of appeals authorizing the parties to file supplemental briefs on the Rule 58 issue (Pet. App. E) is not reported.

JURISDICTION

The Opinion of the court of appeals was filed on September 6, 1989. An Order, Opinion and Amended Dissent was filed on September 26, 1989. Petitioners' Petition for Rehearing En Banc was denied on November 27, 1989. Jurisdiction in this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in this case are set forth in full in the appendix (Pet. App. F). The citations to the statutory provisions are as follows:

Federal Rules of Civil Procedure,

Rule 58

Rule 60

STATEMENT OF THE CASE

In December, 1979, petitioner Beverly Hills Savings made a loan to respondent Melvin Memphrey Carter and his then spouse to finance the purchase of a home in Los Angeles (the "property"). In January 1982, the Carters' defaulted under the promissory note and deed of trust by failing to make the required payments. In May 1982, Beverly Hills and Southland Company, the trustee under the deed of trust, commenced foreclosure proceedings against the property.

In order to forestall the foreclosure, respondent filed five (5) successive bankruptcy petitions in the bankruptcy court. It was in respondent's fourth bankruptcy

that he entered into and the court signed an order on a stipulation to terminate the automatic stay. Based upon the bankruptcy stipulation and notwithstanding respondent's fifth bankruptcy, the trustee's foreclosure sale of the property went forward in September 1983. Beverly Hills was the successful bidder at the foreclosure sale and became the owner of the property.

After the foreclosure sale, unlawful detainer proceedings were commenced against respondent. Despite respondent's cross-complaint for breach of contract and trespass and his defense that the foreclosure sale was held in violation of an automatic stay, Beverly Hills prevailed. Respondent appealed the decision, but the appeal was ultimately dismissed for want of prosecution. Despite the finality of the unlawful detainer judgment, respondent filed a complaint to set aside the trustee's sale, on April 13, 1984 in state court. Respondent alleged, among other things, that the sale of the property was held in violation of an automatic stay and that the stipulation and the bankruptcy court's order terminating the stay were void. Based upon these allegations, petitioners removed the state action to federal court.

In early March 1985, the parties stipulated to vacate the pretrial conference which was scheduled for March 25 on the grounds that they had agreed to settle the matter. The thrust of the settlement was that respondent would repurchase the house. Respondent was represented by an attorney in the settlement negotiations.

At the pretrial conference on March 25, 1985, neither side appeared. The district judge called the matter and, on the record, ordered the clerk to issue the standard minute order dismissing the case as settled, with a sixty-day retention of jurisdiction so that either side could reopen the case if further litigation was necessary. A document entitled "Civil Minutes - General" was

prepared incorporating the judge's ruling. (Pet. App. C). The minutes were initialed by the deputy clerk, mailed to counsel for the parties and entered in the docket on March 26, 1985.

No motion to reopen was brought within sixty days. On or about November 5, 1985, respondent's attorney informed respondent that it was probably too late to complete a settlement or to reopen the action. In late November 1985, appellant began representing himself in pro per.

Approximately 16 months after his action had been dismissed by the district court respondent brought a motion to remand the action. The district court denied the motion and respondent did not appeal. Two months later, and some 19 months after the entry of the district court's dismissal of the action, respondent brought a motion to reopen the action under Fed.R.Civ.P. 60, as well as motions for a preliminary injunction and for an order referring the matter to the district attorney. On November 3, 1986, the district court denied the Rule 60 motion as untimely and the other motions on the merits. (Pet. App. D).

On November 5, 1986, respondent filed a notice of appeal challenging the denial of the motion to reopen and the motion for preliminary injunction. In his brief on appeal respondent disputed the removal to federal court and asserted that the dismissal of the foreclosure action should be set aside due to his attorney's negligence. Petitioner's primary argument in reply was that even a Rule 60(b) motion based on alleged attorney neglect had to have been brought within one year of entry of the district court's order dismissing the action. Neither party argued in the briefs or at oral argument that the judgment had been improperly entered in accordance with Fed.R.Civ.P. 58 or that there was confusion

over the time to appeal. In fact, respondent admitted in his opening brief that his attorney received notice of the dismissal and knew or should have known that the time for appeal had commenced.

The Rule 58 issue was raised for the first time, *sua sponte*, by Circuit Judge Hug during oral argument. Judge Hug was evidently familiar with the Rule 58 issue since he had authored the decision in *Calhoun v. United States*, 647 F.2d 6 (9th Cir. 1981), *overruled on other grounds, Acosta v. Louisiana Department of Health and Human Services*, 478 U.S. 251, 106 S.Ct. 2876, 93 L.Ed.2d 192 (1986) (*per curiam*). Pursuant to petitioners' request, the Ninth Circuit issued an order after the hearing permitting the parties to file a short brief on the Rule 58 issue. (Pet. App. E).

On September 6, 1989, the Ninth Circuit filed its Opinion (Pet. App. A), authored by Judge Hug, which holds that respondent's Rule 60(b) motion filed 19 months after the dismissal was not untimely because the underlying minute order failed to satisfy the separate document requirement of Rule 58 as set forth in *Calhoun v. United States, supra.* Judge Kozinski dissented, arguing that the Opinion not only failed to properly consider the purposes behind Rule 58 and the controlling Ninth Circuit precedent, but it would unnecessarily complicate the docketing responsibilities of the district courts. Petitioners' petition for rehearing en banc was denied on November 27, 1989. (Pet. App. B).

ARGUMENT

1. SUMMARY OF THE ARGUMENT.

The Ninth Circuit has significantly reinterpreted Fed.R.Civ.P. 58 to hold that a judgment is not effective and the time for appeal does not begin to run unless and until a separate piece of paper which bears the precise title "judgment" or "order" is prepared and signed by the *same* deputy clerk, entered in the docket and mailed to all parties. This overly technical construction of Rule 58 is inconsistent with both the text and the purposes behind the rule and exceeds the Ninth Circuit's interpretative authority. As the well reasoned dissent of Judge Kozinski suggests, the Opinion will generate more uncertainty than it resolves. Indeed, if allowed to stand, the Opinion will invalidate certainly dozens, probably hundreds, and perhaps thousands of judgments thought to have been validly entered in the Ninth Circuit since Rule 58 was amended in 1963. A grant of review will allow the Supreme Court to assess whether the Ninth Circuit has overstepped its authority. It will also permit the Court to evaluate whether it is prepared to drastically alter the entry of judgment procedures under Rule 58 and to open the door for an untold number of new appeals.

In addition to defeating the purpose of Rule 58, the Opinion has disregarded the controlling precedent in the Ninth Circuit. Under the principle of *stare decisis*, there was clearly compliance with Rule 58's separate document requirement. The Opinion also conflicts with decisions in at least three other circuits. Review will permit the Court to reconcile the disagreement among the circuits as to what ministerial acts are sufficient to satisfy Rule 58.

2. THE OPINION EXCEEDS THE NINTH CIRCUIT'S AUTHORITY BY IMPOSING BURDENSOME RECORDKEEPING REQUIREMENTS WHICH ARE INCONSISTENT WITH BOTH THE LITERAL LANGUAGE AND THE PURPOSES OF RULE 58.

The literal language of Rule 58 establishes two basic requirements for a judgment to become effective and to commence the time for appeal: "First, a statement of the judgment on a separate document, and second, the entry of the judgment of the clerk on the civil docket." *Center for Nuclear Respons. v. U.S. Nuc. Reg. Com'n.*, 781 F.2d 935, 939 (D.C. Cir. 1986), quoting *Diamond v. McKenzie*, 770 F.2d 225, 230, n.10 (D.C. Cir. 1985). The issue presented in this case is what ministerial acts will satisfy this separate document requirement of Rule 58.

To ascertain what the Supreme Court envisioned would satisfy the separate document language, it is necessary to examine the purposes behind Rule 58. There are two. First, the rule was designed "to make the rendition and entry of judgment simple, easy, and prompt." *6A Moore's Federal Practice*, Paragraph 58.04 [4.-2], at 58-46 (2d Edition 1989). *See also* Fed.R.Civ.P. 58, Notes of Advisory Committee - 1963 Amendments ("Rule 58 is designed to encourage all reasonable speed in formulating and entering the judgment when the case has been decided"). Second, it was designed to remove previous uncertainty about the proper time to appeal or to file post-judgment motions. *United States v. Indrelunas*, 411 U.S. 216, 220, 93 Sup.Ct. 1562, 1564, 36 L.Ed.2d 202 (1973). While a Court of Appeal has some leeway in interpreting the Federal Rules, it must be

careful not to overstep its authority by effectively defeating the purposes or the intended effect of a rule. *Harris v. Nelson*, 394 U.S. 286, 298, 89 Sup.Ct. 1082, 1090, 22 L.Ed.2d 281 (1969). In *Harris*, the Supreme Court declined to extend the discovery provisions of Rule 33 to habeas corpus proceedings where there was no clear intent by the Advisory Committee to do so. The court stated: "We have no power to rewrite the Rules by judicial interpretations. We have no power to decide that Fed.R.Civ.P. 33 applies to habeas corpus proceedings unless, on conventional principles of statutory construction, we can properly conclude that the literal language or the intended effect of the Rules indicates that this was within the purpose of the draftsmen or the congressional understanding." *Id.*

The Opinion by the Ninth Circuit has improperly interpreted Rule 58 to require that a separate document must bear the title "judgment" or "order" and be prepared and signed by the *same* deputy clerk and mailed to the parties. There is no support for any of these requirements in the text of Rule 58. The Advisory Committee surely had an opportunity to specify that the same clerk must prepare and enter the judgment, but declined to do so. Furthermore, although the first sentence of Rule 58 directs the clerk to "sign" the judgment, this is not the operative language of Rule 58 for purposes of determining when the judgment is effective. A judgment is effective when it is set forth on a separate document and entered in the docket. The rule requires no more. Finally, nowhere does the rule require that a judgment be mailed to the parties to be effective. If there is any doubt about the time for appeal, counsel can always simply check the court's docket. *Beaudry Motor Co. v. Abko Properties, Inc.*, 780 F.2d 751, 755 (9th Cir.), *cert.*

denied, 479 U.S. 825, 107 S.Ct. 100, 93 L.Ed.2d 51 (1986).

The Opinion also effectively undermines both purposes behind the 1963 amendment. First, by requiring that the judgment be entitled either "judgment" or "order" and that it be prepared *and* signed by the same deputy clerk, the Opinion will lengthen and complicate the procedure for entry of judgment instead of making it simple, easy and prompt. "Minute Orders" will no longer suffice simply because of their title, even though they unambiguously notify the parties that judgment has been entered and the time for appeal has commenced.[1] Instead, in addition to any minute order, the same deputy clerk will be required to type up a second document, label it a judgment or order, sign it him or herself (initials will evidently not suffice) and mail it to the parties. Petitioners, like Judge Kozinski, are aware of no other case imposing these requirements.

Second, the Opinion will generate more uncertainty about when to appeal than it resolves. The additional technical requirements imposed will create more opportunity for clerical errors. This will shift the focus away from simply providing unambiguous notice of the judgment, the primary purpose of the rule, towards meticulous recordkeeping. This is not what the Advisory Committee intended. *See United States v. Clearfield State Bank*, 497 F.2d 356, 358 (10th Cir. 1974) (Two documents are not required in every case but rather

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[1] As noted earlier, respondent admitted in his opening brief that his attorney received notice and knew or should have known that the time to appeal had commenced. Respondent's argument was simply that he should be excused from his attorney's alleged malpractice for allowing the time to reopen the case to expire.

only where there is some uncertainty or ambiguity in an earlier order).

3. THE OPINION VIOLATES THE PRINCIPLE OF *STARE DECISIS* BY FOLLOWING JUDGE HUG'S DECISION IN *CALHOUN* AND NOT THE CONTROLLING PRECEDENT IN THE NINTH CIRCUIT.

Prior to this Opinion, the Ninth Circuit had directly addressed what is required to satisfy Rule 58 on two other occasions: *Calhoun v. United States, supra*, and *Beaudry Motor Co. v. Abko Properties, Inc., supra.*[2]

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[2] While *Calhoun* and *Beaudry* are the closest cases on point, they are not the only cases in which the Ninth Circuit has discussed the separate document requirement of Rule 58. The following cases also involved Rule 58: *Allah v. Superior Court of State of Cal.*, 871 F.2d 887, 890 (9th Cir. 1989) (Citing *Calhoun* but not *Beaudry*); *Hard v. Burlington Northern Railroad Company*, 870 F.2d 1454, 1458 (9th Cir. 1989) (Declining a request to modify *Calhoun* but failing to consider *Beaudry*); *Noli v. C.I.R.*, 860 F.2d 1521, 1525 (9th Cir. 1988) (Refusing to invalidate an oral order which was never reduced to writing or docketed on the grounds that the reason for application of Rule 58 was not present); *Ferguson v. Intern. Ass'n. of Bridge, Etc., Wkrs.*, 854 F.2d 1169, 1173 (9th Cir. 1988) (Discussing *Beaudry* but not *Calhoun*); *Teamster's Pension Trust Fund v. H.F. Johnson*, 830 F.2d 1009, 1012 (9th Cir. 1987) (Involving waiver of the separate judgment rule); *Mitchell v. State of Idaho*, 814 F.2d 1404, 1405 (9th Cir. 1987) (Discussing neither *Beaudry* or *Calhoun*); *Vernon v. Heckler*, 811 F.2d 1274, 1276 (9th Cir. 1987) (Citing both *Beaudry* and *Calhoun* but resolving case based on *Paddack v. Morris, infra*); *Harris v. McCarthy*, 790 F.2d 753, 756, n.1 (9th Cir. 1986) (Stating that an appellee has a right to know that a judgment he has obtained is secure and therefore is prejudiced when the court inadvertently extends the time for appeal); *Paddock v. Morris*, 783 F.2d 844, 846 (9th Cir. 1986) (Citing *Calhoun*, but

(continued)

There can be no dispute that the facts in this case are closer to *Beaudry* than *Calhoun*. Under the principle of *stare decisis*, the panel was therefore constrained to follow *Beaudry*. *United Scottish Ins. Co. v. United States*, 614 F.2d 188, 191 (9th Cir. 1979) ("[T]hree judge panels of the Ninth Circuit will abide by a prior Ninth Circuit panel decision until either the United States Supreme Court or the Ninth Circuit sitting en banc, explicitly or implicitly, overrules it.")

In *Calhoun*, the document at issue, entitled "Minutes of the Court," mentioned that the order was denied, was signed by the deputy clerk, was referenced with a document control number, and was entered in the docket. It is not clear whether it was mailed to the parties, but counsel evidently appeared and argued the motion and received oral notice of the denial. With little discussion or insight into its reasoning, the Court held that the clerk had failed to satisfy both Rule 79(a) and Rule 58. The Court's holding that there was insufficient compliance with the separate document requirement was apparently based on its belief that an order of dismissal at the end of an opinion is not a separate order but simply a notation of the Court's proceedings. *Calhoun, supra* at 9.

(ftn. continued)
not *Beaudry*, and holding that a five-line "Supplemental Judgment," not a seven-page explanation of the trial court's decision, constituted a separate document); *Taylor Rental Corp. v. Oakley*, 764 F.2d 720, 721 (9th Cir. 1985) (Distinguishing *Calhoun* on the ground that the parties stipulated that the court need not issue a formal order); *Playtime Theaters, Inc. v. City of Penton*, 748 F.2d. 527, 538, n.20 (9th Cir. 1984) (Jurisdiction exists even though only an oral order was issued because parties deemed to have waived separate document requirement); *Hamilton v. Nakai*, 453 F.2d 152, 154 (9th Cir. 1972) (Refusing to allow a one-sentence explanation to transform an order into an opinion where the court, the parties and the clerk all considered the order as final).

Beaudry involved a minute order which was prepared at the direction of the district judge, noted in the civil docket, file stamped, and signed by the deputy clerk. A file-stamped, but unsigned copy of the minute order was also mailed to counsel. In holding that the separate document requirement had been satisfied, the Court specifically considered and distinguished *Calhoun* on three grounds. First, the Court stated that although the order was labelled "Civil Minutes - General," it was "clearly by its language a decision of the Court." *Beaudry, supra* at 755. Stated otherwise, it is the language of the judgment, not its label, that is controlling. Second, the Court noted that both the order itself and the docket sheet demonstrated that the clerk treated the document as an order and mailed copies to counsel. Third, unlike in *Calhoun*, the order contained a stamp showing the date it was entered. The court reasoned that an entry date clearly puts a party on notice of entry of a judgment. If the party still has doubts, the court's record can be checked. *Id.* at 755.

In this case, the order was entitled "Civil Minutes - General," it was entered and noted in the civil docket, it was file-stamped and initialed by a deputy clerk, it was mailed to and received by counsel, it was treated as an order by the clerk, the parties, and their counsel and it clearly indicates that the action has been dismissed and is not a mere description of proceedings. Under these circumstances, there can be no question that *Beaudry* is controlling. See Pet. App. A at 13 ("[T]he order falls on the *Beaudry* side of each of the three lines *Beaudry* drew between itself and *Calhoun*").

4. REVIEW IS WARRANTED BECAUSE THE OPINION CONFLICTS WITH DECISIONS BY THE D.C. CIRCUIT, THE FIFTH CIRCUIT AND THE TENTH CIRCUIT.

The Opinion arguably conflicts with cases in at least three other circuits: the D.C. Circuit, the Fifth Circuit and the Tenth Circuit. For this reason as well, review should be granted. In *Center for Nuclear Respons. v. U.S. Nuc. Reg. Com'n, supra*, the D.C. Circuit had no trouble determining when the time for an appeal commences — when a statement of the judgment on a separate document is entered on the civil docket. In holding that an "order" entered on the docket was sufficient, the Court was not concerned with any of the factors deemed critical by the majority in the Opinion or in *Calhoun*, *e.g.*, the title of the document, preparation and signing by the same clerk or mailing to the parties.

The Fifth Circuit has also refused to elevate form over substance and has issued two decisions which conflict with this Opinion. *United States v. Perez*, 736 F.2d 236 (5th Cir. 1984) concerned an order signed by the District Court which adopted an earlier magistrate's report and which was entered on the docket sheet. The Court held that the mere fact that the first sentence of a district judge's order adopted the magistrate's report did not require that two documents be used by the Court instead of one. The Court concluded: "We are not required to 'mindlessly' apply Rule 58." *Id.* at 238. *See also Escamilla v. Santos*, 591 F.2d 1086, 1088 (5th Cir. 1979) (*per curiam*) (Since the Court intended its memorandum opinion to be a final judgment and the parties treated it as such, the separate document requirement was not strictly applied).

Finally, in *United States v. Clearfield State Bank, supra* at 358-359, the Tenth Circuit ruled that the trial judge's order granting summary judgment, and no more, was a sufficient separate document under Rule 58. After reference to the Advisory Committee's Note on Rule 58, the Court concluded that the rule was never intended to require that two documents be generated in all cases. Rather, the Court stated that two documents are only required when an initial opinion or memorandum leaves some doubt whether the purported entry of judgment was effective. *See also* Annot. 53 ALR Fed 595 (1988) (Collecting numerous cases discussing the separate document requirement).

CONCLUSION

The Ninth Circuit's most recent interpretation of the entry of judgment requirements under Fed.R.Civ.P. 58 ignores both the text and the purposes behind the rule, conflicts with decisions in other circuits, imposes unreasonable burdens on district court clerks, and threatens to invalidate thousands of judgments thought to have been validly entered in the Ninth Circuit. For these reasons petitioners respectfully request that this petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit be granted.

DATED: February 14, 1990

Respectfully Submitted,

NEWMEYER, LANDRUM & DILLION

Gregory L. Dillion
Counsel of Record
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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MELVIN MEMPHREY CARTER, *Plaintiff-Appellant,* v. BEVERLY HILLS SAVINGS AND LOAN ASSOCIATION; SOUTHLAND COMPANY, *Defendants-Appellees.*	No. 86-6610 D.C. No. CV-84-3720-HLH ORDER, OPINION, AND AMENDED DISSENT

Appeal from the United States District Court
for the Central District of California
Harry L. Hupp, District Judge, Presiding

Argued March 7, 1988—Pasadena, California
Submitted August 3, 1988

Opinion Filed September 6, 1989
Order and Amended Dissent Filed September 26, 1989

Before: Procter Hug, Jr., Arthur L. Alarcon and
Alex Kozinski, Circuit Judges.

Opinion by Judge Hug; Dissent by Judge Kozinski

SUMMARY

Courts and Procedure

Reversing and remanding the district court's denial of a Rule 60(b) motion to vacate a judgment, the court held that a Rule 60(b) motion is not untimely when the underlying

minute order fails to satisfy the requirements of a final judgment under Rule 58.

Appellant Melvin Memphrey Carter sued Beverly Hills Savings and Loan seeking to set aside a foreclosure sale of his home. The action affected Title 11 therefore prompting the case's removal to federal court. A settlement agreement was reached and at the scheduled pretrial conference, a form document entitled Civil Minutes-General was filed, bearing a date entry stamp that was initialed by the deputy clerk but not signed by the clerk. At this pretrial conference, neither party appeared, and the judge decided to dismiss the action. Approximately 17 months later, Carter filed a motion to reopen his case and vacate the judgment under F.R. Civ. P. 60(b). The district court denied Carter's motion, holding that it was untimely. A motion under F.R. Civ. P. 60(b) must be made within a reasonable time, and for reasons stated in the rule not more than one year after the judgment, order or proceeding was entered or taken.

[1] No case precedent differentiated "taken" from "entered," which left an ambiguity in Rule 60(b) as to when the time for filing a Rule 60(b) motion begins to run. To provide a clear signal when the time period has begun to run, the court held that the time requirements of Rule 60(b) only commence running upon "entry" of final judgment that complies with F.R. Civ. P. 58. **[2]** Rule 58 requires that every judgment must be set forth on a separate document and **[3]** signed by the clerk. In this case, the clerk prepared the minutes but did not sign them. **[4]** The civil docket book confirmed that a separate order was not filed. Rather, the minutes of the action taken by the judge at the pretrial conference was the only document filed. **[5]** Thus, the time for filing an appeal or post-judgment motions did not commence to run. **[6]** A judgment in compliance with Rule 58 was never entered, leaving Carter free to file a notice of appeal, which would have been deemed timely.

Judge Kozinski dissented, disagreeing with the majority's findings that the minute order was insufficient under Rule 58. Further, under each of the majority's propositions, he feared the docketing responsibility of the district courts would be unnecessarily complicated.

COUNSEL

Melvin Memphrey Carter, pro per, Los Angeles, California, for the plaintiff-appellant.

Gregory L. Dillion, Newmeyer, Landrum & Dillion, Newport Beach, California, for the defendants-appellees.

ORDER

KOZINSKI, Circuit Judge.

The dissent issued on September 6, 1989, is amended as follows: Delete from slip op. page 10971, lines 1-4, the sentence reading "The requirements of the Federal Rules, more importantly, are imposed by Congress; they are statutes like any other, and cannot be modified by federal courts." Replace it with "The Federal Rules, more importantly, are promulgated by the Supreme Court pursuant to the Rules Enabling Act; federal courts must treat them as they would statutes, and may not modify them by judicial construction."

The majority opinion remains unchanged.

OPINION

HUG, Circuit Judge:

This case involves an appeal from the denial of a Rule 60(b) motion to vacate a judgment dismissing Carter's action to set

aside a foreclosure sale on his home. The district court judge, believing that the parties had entered into a settlement agreement, dismissed the underlying action with a retention of jurisdiction for sixty days to reopen if settlement was not completed. Carter made a Rule 60 motion approximately eighteen months later, which the district court denied as untimely. Because the underlying judgment was never entered in accordance with Fed. R. Civ. P. 58, we reverse.

I.

Facts

Carter brought this action in the California Superior Court against Beverly Hills Savings and Loan and Southland Company, seeking to set aside a foreclosure sale of his home which had been accomplished by Southland Company acting as trustee under a deed of trust securing a loan from Beverly Hills Savings and Loan. Carter alleged that the foreclosure sale was in violation of a bankruptcy automatic stay and a stipulation between Carter and Beverly Hills Savings and Loan in the bankruptcy action.

This case was removed to federal court on the grounds that it was an action affecting Title 11, thus affording federal jurisdiction. A pretrial conference was set for March 25, 1985, and a trial date was set for April 30, 1985. Prior to the pretrial conference, the attorneys for the parties entered into a stipulation requesting that the district court vacate the existing pretrial conference and trial dates because the parties had agreed in principle upon a settlement. The settlement agreement was basically an agreement whereby Carter could repurchase the house. The stipulation noted that the settlement "would require the parties and their counsel to prepare releases, escrow instructions, title reports, etc. relating to the subject property which will take 30 days to prepare." The parties did not stipulate to dismissal of the action but instead only sought an order vacating the pretrial conference and trial

dates, with a status report to be filed in 45 days. An order incorporating these terms was provided at the end of the stipulation document, but was never signed by the judge. Instead, at the time scheduled for the pretrial conference, the matter was called before the judge, who, after noting that counsel were not present, stated:

> All right. The court has been informed through the law clerks that the matter's been settled, but we haven't got any paper work on that. Our standard minute order dismissing the case as settled with a 60-day retention of jurisdiction will issue.
>
> If you could make a note on that one, Bob.

A form document entitled "Civil Minutes - General" was thereafter filled in showing the case title, and the presence of District Judge Harry L. Hupp, Deputy Clerk Robert Bolton, and Court Reporter Bob Stark. The minutes then set forth the following entry:

> PROCEEDINGS: Pre Trial Conference
>
> Counsel not present. Counsel inform that this matter has settled. Court dismisses the action by reason of settlement and retains jurisdiction over the matter for 60 days to vacate this order and to reopen the action upon a showing of good cause that the settlement has not been completed and further litigation is necessary. Entered _____ JS-6.

The minutes bear a stamp showing that they were entered on March 26, 1985. This entry stamp was initialed by a deputy clerk with the initials "SB." Another stamp shows that the minutes were mailed to counsel for the parties. These minutes were entered in the civil docket book as follows:

> 3-25-85 sb 18. crt dism actn reason of settlmnt & retn jurdctn 60 reopen if settlmnt not

completed (ENT 3-26-85) MD JS 6
Mld cpys

Approximately 15 months later, on August 20, 1986, Carter filed a motion to remand, which was eventually taken off calendar and never granted or denied. On September 12, 1986, Carter notified the court that he was substituting himself for the attorney who had been representing him, and would proceed pro se. On October 9, 1986, Carter filed a motion to issue a preliminary injunction, a motion to refer the case to the district attorney, and a motion to reopen the case. The district court denied these motions on November 3, 1986, stating that the time within which to make a Rule 60 motion had long since passed, and the motions appear to have no merit. Carter timely appeals. We review the district court's denial of a Rule 60 motion for an abuse of discretion. *Thompson v. Housing Auth.*, 782 F.2d 829, 832 (9th Cir.), *cert. denied*, 479 U.S. 829 (1986).

II.

Timeliness of Rule 60(b) Motion

The district court denied Carter's Rule 60 motion as untimely. A motion under Fed. R. Civ. P. 60(b) must be made "within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken."

A.

[1] The use of the words "entered or taken" creates some ambiguity as to when the time for filing a Rule 60(b) motion begins to run. We find no case that differentiates "taken" from "entered". The Federal Rules of Civil Procedure have established a procedure by which a judgment is to be entered. The Supreme Court has commented that the purpose of these rules in relation to filing a notice of appeal, is to make it clear

when the time for filing a notice of appeal begins to run. *See Bankers Trust Co. v. Mallis*, 435 U.S. 381, 384-85 (1978) (per curiam). The need for clarity is equally compelling when it comes to filing post-judgment motions under Rule 59 and 60. Both these rules contain time requirements which are as rigidly applied as the time requirement for filing a notice of appeal. *See* Fed. R. Civ. P. 6(b) (the court may not extend time for taking action under either Rule 59 or 60(b)). Wherever the rules establish a time requirement that limits a litigant's ability to obtain relief from a final judgment, it is imperative that the district court provide a clear signal that the time period within which that relief can be sought has begun to run. For this reason, we hold that the time requirements of Rule 60(b) only commence running upon "entry" of final judgment that complies with Rule 58. *See* 11 C. Wright & A. Miller, *Federal Practice and Procedure*, § 2781 at 6 & n.5 (1973) (the time to make a Rule 60(b) motion runs from entry of judgment).

It follows that where a final judgment complying with Rule 58 was never entered, a post-judgment motion may not be deemed untimely. *Cf. Allah v. Superior Court*, 871 F.2d 887, 890 (9th Cir. 1989) (unless the judgment is entered in compliance with Rule 58, a party will not ordinarily be found to have exceeded the time limits for filing a notice of appeal).

B.

[2] We therefore now turn to the question of whether the judgment Carter was seeking to reopen through his Rule 60(b) motion was properly entered. Entry of judgment is governed by Fed. R. Civ. P. 58, which requires that every judgment must be set forth on a separate document. The document that embodies the district court's decision in the present case is entitled "Civil Minutes - General", and contains a description of what transpired in the courtroom. This court has previously held that such a document does not sat-

isfy the separate document requirement in Rule 58. *See Calhoun v. United States,* 647 F.2d 6, 8-9 (9th Cir. 1981).

[3] Rule 58 also requires that the order be signed by the clerk. The signature of a duly authorized deputy clerk would be adequate. A clerk's ministerial duties may be performed by a deputy clerk. 28 U.S.C. § 956 (1982). In this case, Robert Bolton was the deputy clerk present in the courtroom. He obviously prepared the minutes but did not sign them. On the minutes there is a file stamp stating "ENTERED Mar. 26 1985, Clerk, U.S. District Court Central District of California by SB Deputy." This attestation is obviously not by the deputy clerk, Robert Bolton, who was in the courtroom and prepared the minutes, but rather an attestation by the deputy clerk who entered the minutes in the docket book. The bottom right-hand page of the minutes bears the initials of a deputy clerk "LRM," with no indication of the significance of those initials. Rule 58 contemplates a minute order prepared by a deputy clerk who then signs the minute order he prepares.

[4] The entry of the court's action in the civil docket book confirms that the requirements of Rule 58 were not met. As previously noted, the entry in the civil docket book is as follows:

> 3-25-85 sb 18. crt dism actn reason of settlmnt & retn jurdctn 60 reopen if settlmnt not completed (ENT 3-26-85) MD JS 6 Mld cpys

This entry does not show that a separate order was filed and entered as required by Rule 58, but rather that the document entered was the minutes of the action taken by the judge at a pretrial conference. In *Calhoun,* we found the entry of similar minutes not to comply with Rule 58.

Beverly Hills Savings and Loan relies upon *Beaudry Motor Co. v. ABKO Properties, Inc.,* 780 F.2d 751 (9th Cir.), *cert.*

denied, 479 U.S. 825 (1986). In that case, the district court issued a minute order which stated "IT IS ORDERED." That document was signed by a deputy clerk, entered in the civil docket book, and mailed to counsel. *Id.* at 754-55. In this case, we have civil minutes which do not bear the imperative "IT IS ORDERED," and are not signed by the deputy clerk who prepared them. Although the civil minutes were entered in the civil docket book, they do not constitute a separate order nor were they entered as an order. This case is thus controlled by *Calhoun* rather than *Beaudry Motor*.

C.

We next consider the question of whether the decision on March 25, 1985 is a final judgment from which a Rule 60(b) motion would lie. The Supreme Court in *Bankers Trust Co.* distinguished between (1) the situation in which a decision was never entered, as provided in Rule 79(a), and (2) the situation in which the separate-document requirement of Rule 58 was not met. In the former, the Court indicated that the judgment may not be final, noting that Rule 79 "fulfills a public recordkeeping function over and above the giving of notice to the losing party that a final decision has been entered against it." *Bankers Trust Co.*, 435 U.S. at 384 n.4. In the latter, however, the separate-document requirement can be waived and the finality requirement is still met. *Id.* at 384-85. The Court emphasized that the purpose of the separate-document requirement is to establish certainty as to the time within which to file a notice of appeal. "The 1963 amendment to Rule 58 made clear that a party need not file a notice of appeal until a separate judgment has been filed and entered." *Id.* at 385 (citation omitted). However, the Court noted that certainty as to timeliness is not advanced after an appeal has been filed by requiring dismissal of the appeal in order for the district court to file and enter a separate judgment. "Wheels would spin for no practical purpose." *Id.*

Essentially, the same situation is present in this case with regard to the Rule 60(b) motion. The separate-document

requirement of Rule 58 was not met although the decision was entered on the civil docket, fulfilling the requirements of Rule 79(a).

[5] The possible question of finality raised in *Bankers Trust Co.*, 435 U.S. at 384 n.4, is obviated because of the entry of the decision in the civil docket. However, the entry was not of a judgment that complied with Rule 58 and, thus, the time for filing an appeal or post-judgment motions did not commence to run. Thus, the district court erred in denying the 60(b) motion as untimely.

D.

[6] We note finally that the facts of this case support the logic of our conclusion that the *Bankers Trust Co.* analysis applies to post-judgment motions as well as appeals. Because a judgment complying with Rule 58 was never entered, Carter could still file a notice of appeal, and it would be deemed timely. *Allah*, 871 F.2d at 890. Were we to hold that Rule 58 had no bearing on the time requirements for filing a Rule 60(b) motion, Carter's Rule 60(b) motion would be held untimely, at a time when he could still file a timely appeal of the underlying judgment. Given that Rule 60 motions are usually the tool used to obtain relief from a final judgment *after* the time for filing an appeal has passed, this result would be extraordinary.

E.

The dissent speculates that our ruling creates a precedent that will lead to administrative inconvenience for clerical personnel in court clerk's offices. To the contrary, it is very simple to comply with Rule 58. A judgment or an order signed by the judge or the clerk that is a separate document and labeled as a judgment or order would clearly comply. It is only the sloppy procedure of trying to make court minutes suffice for a separate order that unnecessarily raises the questions we

faced in *Calhoun*, *Beaudry*, and we face in this case. This practice should be discouraged. It is simple enough for the clerk or a deputy to type an order as a separate document, label it an order, sign it, and then have it entered in the docket book as an order. This would provide the clear notice that Rule 58 contemplates. A document labeled as minutes, with various deputy clerks' initials scattered about, with no clear indication what those initials signify, may afford some measure of administrative convenience, but when important post-judgment rights of litigants are at stake, any such administrative inconvenience weighs light in the balance.

III.

Merits of 60(b) Motion

In addition to finding Carter's motion to reopen untimely, the district court also specified the alternate grounds that the motion appeared to have no merit. The district court dismissed Carter's action based on his understanding that the parties had settled the action and had stipulated to a dismissal. Such a dismissal would have been proper under Fed. R. Civ. P. 41(a), which provides for voluntary dismissals, if, in fact, the parties had stipulated to the dismissal. However, they did not do so. Rule 41(a)(1)(ii) allows the parties to dismiss an action voluntarily after service of an answer by filing a written stipulation to dismiss, signed by all of the parties. The requirements of this subsection may be met either by filing a written stipulation or by making an oral stipulation in open court. *Eitel v. McCool*, 782 F.2d 1470, 1472-73 (9th Cir. 1986). In addition, under Fed. R. Civ. P. 41(a)(2), the court may, under certain circumstances, order dismissal of an action "at the plaintiff's instance." Such an order is only proper if a plaintiff has made a motion for dismissal. 9 C. Wright & A. Miller, *Federal Practice and Procedure*, § 2364 at 160-61 (1971).

Here the parties did not move for or stipulate to dismissal, either orally or in writing. Neither party appeared at the pretrial conference at which the judge decided to dismiss the action, and the written stipulation that the parties filed only asked that the pretrial conference and trial date be vacated, not that the action be dismissed. Thus there was no basis for the district court to dismiss the action.[1] Accordingly, Carter's motion to reopen that dismissal, which we hold was timely, should have been granted because there was no basis for an involuntary dismissal under Rule 41(a).

We reverse the action of the district court, vacate the dismissal, and remand for further proceedings on Carter's underlying action.

REVERSED and **REMANDED.**

KOZINSKI, Circuit Judge, dissenting.

The majority finds the minute order below insufficient in three respects: (1) It failed to satisfy Rule 58's separate document requirement; (2) it failed to satisfy Rule 58's requirement that judgments be signed by the clerk; and (3) it was not entered in the docket in accordance with Rule 58. I disagree with all three propositions. I fear, moreover, that the majority opinion will unnecessarily complicate the docketing responsi-

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[1]The court does have the authority under Fed. R. Civ. P. 41(b) to enter an involuntary dismissal on its own initiative. The record here contains no indication that this was the judge's intent. Furthermore, the only possible basis for an involuntary dismissal under the facts of this case would have been the parties' failure to appear at the pretrial conference. However, this alone is not grounds for dismissal where, as here, the case was still in its early stages and there was no warning that failure to appear would be grounds for dismissal. *See Tolbert v. Leighton*, 623 F.2d 585, 586-87 (9th Cir. 1980).

bility of the district courts, creating greater opportunity for confusion and error.

1. The Separate Document Requirement

"Every judgment shall be set forth on a separate document." Fed. R. Civ. P. 58. Here, there was a separate document: It is titled "Civil Minutes - General," it was mailed to the parties, and it is quoted in full in the majority opinion. Majority op. at 11943. If we were interpreting this part of Rule 58 for the first time, I should think our job would be done.

But this isn't our first time; it is our third. First, in *Calhoun* v. *United States*, 647 F.2d 6 (9th Cir. 1981), *overruled on other grounds*, *Acosta* v. *Louisiana Dep't of Health & Human Resources*, 478 U.S. 251 (1985) (per curiam), we held that a document entitled "Minutes of the Court" failed to satisfy the separate document requirement where it merely *referred* to an order rather than purporting to be an order itself, 647 F.2d at 8-9; it was not mailed to the parties, *id.* at 9; and it was never entered in the docket as an order. *Id.* Next, in *Beaudry Motor Co.* v. *Abko Properties, Inc.*, 780 F.2d 751 (9th Cir.), *cert. denied*, 479 U.S. 825 (1986), we held that a minute order *did* satisfy Rule 58's separate document requirement where it stated on its face that it was an order, 780 F.2d at 755; it *was* mailed to the parties, *id.*; and it *was* entered in the docket as an order. *Id. Beaudry* took full account of *Calhoun*, and distinguished it on precisely these three grounds.

The distinctions are picayune, but our task is clear: We must decide whether the minute order at issue in this case is more like the one in *Calhoun* or the one in *Beaudry*. The answer is equally clear: The order falls on the *Beaudry* side of each of the three lines *Beaudry* drew between itself and *Calhoun*.

A. While the document at issue in *Calhoun* merely referred to proceedings at which a motion was denied, the correspond-

ing document in *Beaudry* "does not reference proceedings but is clearly by its language a decision of the court." 780 F.2d at 755. Here, the document entitled "Civil Minutes - General" reads in part: "Court dismisses the action by reason of settlement and retains jurisdiction over the matter for 60 days to vacate *this order* . . . ." Majority op. at 11943 (emphasis added). The document claims to be a decision of the court in two different ways. First, it announces the court's disposition of the case in the present tense, suggesting that the document itself is dismissing the case, rather than referring to some other court action with that effect. *Cf. Calhoun*, 647 F.2d at 8 (past tense — "Motion argued and ordered denied" — indicating that the document at issue was a description of an order rather than an order itself). Second, the document explicitly calls itself "this order." Is there any clearer way of issuing an order? *Cf. Beaudry*, 780 F.2d at 755 ("The copy of the minute order with its language 'IT IS ORDERED' clearly put plaintiff's counsel on notice that an order had been entered against his client."); *id.* at 755 n.3 ("plaintiff's counsel received a document, the sole contents of which informed him that his post-judgment motions had been *ordered* denied and which was file stamped. We have no trouble concluding that in these circumstances a reasonable person would realize that the court had entered an order finally disposing of the case."). As I see it, the document at issue here is much more like the one in *Beaudry* than the one in *Calhoun*.

B. In *Calhoun*, the clerk did not mail copies of the disputed document to the parties, 647 F.2d at 8; in *Beaudry*, the clerk did. 780 F.2d at 755. Here, the clerk mailed copies to the parties. Majority op. at 11943. Again, we fall on the *Beaudry* side of the line.

C. The document in *Calhoun* contained no stamp or other notation indicating it had been entered as an order. 647 F.2d at 8; in *Beaudry*, the document included such a stamp. 780 F.2d at 755. Here, "[t]he minutes bear a stamp showing that

they were entered on March 26, 1985." Majority op. at 11943. Once again, this case tracks *Beaudry* rather than *Calhoun*.

Beaudry and *Calhoun* have given us three extremely fine distinctions to work with when considering whether Rule 58's separate document requirement has been satisfied, but they are easy to apply here: This case is squarely governed by *Beaudry*, not *Calhoun*.[1] The minute order below therefore did not run afoul of the separate document requirement.

2. The Clerk Signature Requirement

"[T]he clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment." Fed. R. Civ. P. 58. There is no dispute that the judgment below was prepared, signed and entered by duly authorized deputy clerks, *see* 28 U.S.C. § 956 (1982); the majority finds fault only because the deputy clerk who prepared the order was not also the one who signed it. Majority op. at 11946.

But Rule 58 nowhere requires that the signature below a minute order be that of the same clerk who prepared the order. The majority comes to this conclusion without citing any authority, and I know of none; nor do I think it can fairly be derived from the text of Rule 58 alone. Moreover, such a strict rule makes little practical sense. Many district courts, including in particular the Central District of California where these events took place, employ large numbers of deputy clerks. When one deputy gets sick, or goes on vacation, or is busy in court, he may ask another to sign a minute order he prepared the day before. I see no plausible reason to invalidate such an order.

---

[1]The distinctions between *Beaudry* and *Calhoun* were not altered by *Allah v. Superior Court*, 871 F.2d 887 (9th Cir. 1989). *Allah* did not consider whether a document satisfied Rule 58's separate document requirement, because no such document existed in the first place. *Id.* at 890.

It is bad enough to add a new judicially-created requirement to Rule 58; it is even worse when that requirement serves no conceivable purpose. I would hold that the minute order below satisfied Rule 58's clerk signature requirement.

3. The Docket Entry Requirement

"A judgment is effective only . . . when entered as provided in Rule 79(a)." Fed. R. Civ. P. 58. Here, the judgment was entered in the civil docket; the entry is quoted in full in the majority opinion. Majority op. at 11946. The majority finds this entry insufficient because it "does not show that a separate order was filed and entered as required by Rule 58." *Id.*

But Rule 58 only requires that a judgment be *set forth* on a separate document; it does not also require that the corresponding docket entry state that a separate document exists. Instead, Rule 58 explains that docket entry requirements are controlled by Rule 79(a). Rule 79(a), in turn, imposes a number of requirements — entries must be in chronological order, they must be dated, they must be brief, and they must "show the nature of each paper filed." Fed. R. Civ. P. 79(a) — but a statement of the separateness of a document is not among them. There is no dispute here that the literal requirements of Rule 79(a), and therefore the docket entry requirements of Rule 58, have been met. The entry at issue is chronological, dated, brief, and reads in part "crt dism actn." Majority op. at 11946. Anyone reading it would understand the nature of the paper filed: It was obviously a document in which the court dismissed the action. Rule 79(a) requires no more.

With all deference to its author, neither does *Calhoun*. As discussed above, *Calhoun* found that a minute order fell short of Rule 58's separate document requirement. We then noted that this shortcoming was corroborated by the corresponding docket entry, which "does not show the filing and entry of a separate order." 647 F.2d at 9. But *Calhoun* did not purport to be adding any requirements to Rule 79(a): It was con-

cerned with whether a document was sufficiently separate in the first place, not whether the entry of that document in the docket sufficiently reflected its separateness. *Calhoun* did go on to find a Rule 79(a) violation, but only because the docket entry was not dated, as Rule 79(a) requires. *Id. Calhoun* thus did not read any requirement into Rules 58 or 79(a) that a docket entry state explicitly that a separate order was filed; it is the majority opinion that today introduces this requirement for the first time. As with the requirement that orders be prepared and signed by the same deputy clerk, this requirement is a judicial encrustation onto the Federal Rules that serves no conceivable purpose.

* * *

The Federal Rules of Civil Procedure abound with technical requirements, but they are, by and large, requirements that serve important purposes. The separate document requirement, for example, exists so that the parties will know exactly when judgment has been entered and they must begin preparing post-verdict motions or an appeal. *Bankers Trust Co.* v. *Mallis*, 435 U.S. 381, 385 (1978) (per curiam). The Federal Rules, more importantly, are promulgated by the Supreme Court pursuant to the Rules Enabling Act; federal courts must treat them as they would statutes, and may not modify them by judicial construction. *See Harris* v. *Nelson*, 394 U.S. 286, 298 (1969).

Regretfully, I must conclude that the majority has failed to consider either of these principles. It has added two apparently pointless requirements to Rule 58: From now on, a judgment in this circuit will be without effect unless it is prepared and signed by the same deputy clerk, and entered in the docket with a notation that explicitly states it is a separate document. I cannot figure out why this should be; the new requirements are so counterintuitive that they will provide fertile soil for clerical errors, and thus generate more uncertainty than they resolve. More fundamentally, I cannot dis-

cern the source of our authority to make such textually unsupported modifications to the Federal Rules. I respectfully dissent.

APPENDIX B

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
NOV 27 1989
Cathy A. Catterson, Clerk
U.S. Court Of Appeals

MELVIN MUMPHREY [*sic*] CARTER,
Plaintiff-Appellant,
v.
BEVERLY HILLS SAVINGS & LOAN ASSOCIATION, SOUTHLAND CORP.,
Defendants-Appellees.

No. 86-6610
D.C. No. CV-84-3720-HLH

ORDER

Appeal from the United States District Court
for the Central District of California

Before: HUG, ALARCON, and KOZINSKI,
Circuit Judges.

Judges Hug and Alarcon have voted to deny the petition for rehearing, and Judge Kozinski has voted to grant the petition for rehearing. An en banc vote was not requested by any member of the panel.

The full court has been advised of the en banc suggestion and no active judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES — GENERAL

Case No. CV84-3720-HLH
Date March 25, 1985
Title Melvin M. Carter v. Beverly Hills Savings & Loan

DOCKET ENTRY

PRESENT:

HON. HARRY L. HUPP, JUDGE — Bob Stark, Court Reporter
Robert Bolton, Deputy Clerk

ATTORNEYS PRESENT FOR PLAINTIFFS:

ATTORNEYS PRESENT FOR DEFENDANTS:

PROCEEDINGS: PRETRIAL CONFERENCE

Counsel not present. Counsel inform that this matter has settled. Court dismisses the action by reason of settlement and retains jurisdiction over the matter for 60 days to vacate this order and to reopen the action upon a showing of good cause that the settlement has not been

completed and further litigation is necessary. Entered _____ JS-6.

Issued c/cys:

ENTERED
MAR 26 1985
Clerk, U.S. District Court
Central District Of California
By /s/ SB Deputy

Randy Keith
19240 Nordoff Street
Suite 201
Northridge, Ca. 91324

I. Bruce Speiser
McKenna Conner & Cuneo
28th Floor
3435 Wilshire Blvd.
Los Angeles, Ca. 90010

√ Docketed
√ Mld copy Ptys
__ Mld Notice Ptys
√ JS-6

MINUTES FORM 11
CIVIL — GEN

Initials of Deputy Clerk /s/ LRM

D — M

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES — GENERAL

Case No. CV84-3720 HLH
Date Nov. 3, 1986
Title Carter v. Beverly Hills Savings & Loan Assn.

DOCKET ENTRY

PRESENT:

HON. Harry L. Hupp, JUDGE Kathy Husdon
Robert Bolton
Deputy Clerk
Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:

In Pro Per

ATTORNEYS PRESENT FOR DEFENDANTS:

Robert M. Rudnicki
MCKENNA, CONNER & CUNEO

PROCEEDINGS:

Plaintiffs' Motion to Reopen case and to Refer Matter to the DA's Office
Plaintiffs' Motion for Preliminary Injunction

ORDER (also, if applicable, findings and memorandum opinion):

The motion to reopen, the motion for preliminary injunction, and the motion to refer the case to the District Attorney are all denied.

The time limits within to make the motion to reopen under Rule 60 have long since passed. In addition, the motions appear to have no merit.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
MAR 27 1988
Cathy A. Catterson, Clerk
U.S. Court Of Appeals

MELVIN MEMPHREY CARTER,
Plaintiff-Appellant,
v.
BEVERLY HILLS SAVINGS & LOAN ASSOCIATION; SOUTHLAND COMPANY,
Defendants-Appellees.

D.C. No. CV-84-3720-HLH
No. 86-6610

ORDER

On appeal from the United States District Court
for the Central District of California

Before: HUG, ALARCON, and KOZINSKI,
Circuit Judges.

It appears to the court that there is no final judgment dismissing the action in this case. The record reflects, in the civil minutes, a proceeding at a pretrial conference, in which it is stated that the court "dismisses the action by reason of settlement and retains jurisdiction over the matter for 60 days to vacate this order and reopen the action upon a showing of good cause that the settlement has not been completed and further litigation is necessary." A stamp on the minutes reflects that this was entered on March 26, 1985, with the initials of a

deputy clerk attesting to the entry and the initials of a deputy clerk at the bottom of the page. There is no indication that the court has approved that document as a form of judgment. A copy of the minutes is attached to this order. The parties are directed to file supplemental briefs not to exceed 10 pages in length, addressing the issue of whether the entry of the minutes on March 26, 1985 constitutes an entry of judgment in accordance with Rule 58 of the Federal Rules of Civil Procedure. If any other document is relied upon as a judgment entered in accordance with Rule 58, such document shall be called to the attention of the court. The district court record shall remain with the Clerk of the United States Court of Appeals in the Pasadena office, in the event either party may wish to examine that record.

The supplemental briefs shall be due on or before 21 days from the date of the entry of this order.

APPENDIX F

FEDERAL RULES OF CIVIL PROCEDURE

RULE 58. Entry of Judgment

Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a). Entry of the judgment shall not be delayed for the taxing of costs. Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course.

RULE 60. Relief From Judgment or Order

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

KL

RESPONSE REQUESTED

No. 89-1345

Supreme Court, U.S.
FILED
JUN 8 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

BEVERLY HILLS SAVINGS
& LOAN ASSOCIATION,
SOUTHLAND CORPORATION,

Petitioners,

vs.

MELVIN MEMPHREY CARTER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

MELVIN MEMPHREY CARTER

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BEST AVAILABLE COPY

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BEVERLY HILLS SAVINGS & LOAN ASSOCIATION, SOUTHLAND CORPORATION,

Petitioners,

vs.

MELVIN MEMPHREY CARTER,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

In December, 1979, Petitioner, Beverly Hills Savings and Loan Association, refinanced the property located at 1351 South Burnside Avenue, Los Angeles, California, which had been previously purchased by the Carters for the purpose of Respondent to invest into a

Bail Bond Business at 70% of it's appraised value.

Mrs. Carter found that Beverly Hills Savings & Loan Association had altered the percentage rates in the Note and Deed of Trust. Mrs. Carter complained about the same. When Mrs. Carter complained, Mrs. Carter was given the choice of leaving the loan as it stood or Beverly Hills Savings and Loan Association would recall the loan. (This document can furnish the Court with proof of the same as soon as Respondent can get the same out of storage.)

In January, 1982, the Carters agreed to divorce, and the loan went into default upon the Promissory Note and Deed of Trust. In or about May or June, Petitioners sent to Respondent a Notice of Default, sometime thereafter in order to protect his interest.

The Respondent filed a Chapter 13 in or about August 24, 1982, and the same was

dismissed in September, 1982, because the Respondent failed to submit the two payments that were required to be submitted.

This Respondent filed another Chapter 13 on October 6, 1982, through an attorney who failed to appear, failed to submit the payments, and has not been seen since. (Investigate the files.) This Chapter 13 was dismissed on October 27, 1982, #LAX 8216614-BR. (See Exhibit , Page 2.)

This Respondent filed another Chapter 13 on November 22, 1982. This matter was dismissed January 6, 1983, for errors in calculation of interest and trustee fees, #LAX 8220220. At the hearing, Attorney Bernard M. Reesen and Respondent agreed to an Amendment in open Court on March 21, 1983, that he, as the attorney for the petitioner, would agree to withdraw the objection to the Chapter 13 plan. (See Exhibit , and made a part of this response.)

On or about April 11, 1983, the Petitioners and Respondent agreed in open Court to permit the Court to accept the Amended Chapter 13 on the following terms and conditions:

1. Not later than 1:30 p.m., the Respondent would submit to the Court $3,556.67.

2. That the future payments would be paid to Shearson American Mortgage Company at 1201 East Highland Avenue, Suite D, San Bernardino, California 92408. The aforementioned company is/was an agent of Beverly Hills Savings & Loan.

3. Shearson American Express Mortgage Company would serve on the Respondent a Notice to Proceed with the sale and Respondent would have 15 days to respond to the Court if so desired, if Respondent defaulted.

4. That this Agreement would be in force for a period of 36 months.

5. On or about April 25, 1983, this Chapter 13 was approved by the Court.

6. On or about April 25, 1983, the Court received the amount of $3,558.64 as agreed.

On or about May 5, 1983 (some 10 days after), this Respondent submitted to Shearson American Express Mortgage Company (an agent of Beverly Hills Savings & Loan Association) the sum of $1,139.55 as agreed. However, Shearson American Express Mortgage Company rejected the aformentioned stating they had not received the files back from Attorney Bernard M. Ressen. This Respondent submitted the same to Attorney Bernard M. Ressen, the attorney who represented Petitioners, whereas this amount was cashed by Shearson American Express Mortgage Company or it's representatives.

On or about June 8, 1983, this Respondent submitted (again) to Shearson American

Express Mortgage Company (as agent for Beverly Hills Savings & Loan Association) the amount as agreed. However, the amount was rejected again by Shearson American Express Mortgage Company. They stated that the file had not been submitted to them. It was suggested that the Respondent submit the payments to Beverly Hills Savings & Loan Association at office in Beverly Hills, California, and again to Attorney who was no longer with the law firm.

Shortly thereafter, a for sale sign was posted on the premises at 1351 S. Burnside Avenue, Los Angeles California. On or about September 7, 1983, the property went for sale without the creditors returning to Court and obtaining the lift of the automatic stay even though the debtor filed and served on the creditors another Chapter 13.

Shortly thereafter, this Respondent filed a Motion to Dismiss the Amended

Chapter 13.

Shortly thereafter, this Respondent filed a lawsuit in the State Court and served the Petitioners. Instead of the Petitioners filing an Answer to the Complaint, the Petitioners filed a Motion to Transfer the Case to the United States District Court without notifying the Respondent when the Respondent went to file a Request for a Default Judgment. When this Respondent became aware that the Petitioners had filed a response to the Respondent's Complaint sometime later the Petitioners filed an Answer to the Complaint. This was approximately some 45 days or 60 days (take judicial notice).

After the Respondents received a photocopy of the answer from the Court, This Respondent received a Notice for the Respondent and Petitioner to have a conference. Shortly thereafter, the Petitioners and the Respondent met in Court for a day of Discovery.

and at that time this Respondent attempted to explain to Judge Hupp what had happened. Judge Hupp completely ignored the Respondent's explanation. However, Judge Hupp did recommend that the Petitioners sell the two properties back to the Respondent.

When the Petitioners refused to converse with the Respondent, this Respondent obtained an attorney and the Petitioner agreed to sell the property lacated at 1351 South Burnside back to the Respondent (see Exhibit , and made a part of this complaint.

This agreement had the following provisions:

1. That the Respondent would repurchase the property located at 1351 South Burnside, Los Angeles, California 90019 for the sum of $79,000.

2. That Respondent forfeit his rights in the property lacated at 1269 S. 125th and 1351 South Burnside Avenue.

3. That Respondent would forfeit his rights to $3,778.17 that Petitioners were holding from American Bonds Insurance.

Petitioners orally agreed that Respondent would use the $3,778.17 toward the down payment. However, Judge Hupp refused to sign the Agreement and took jurisdiction over the case for 60 days.

This Respondent obtained the following:

1. An appraisal of the property in the amount of $105,000.00.

2. A loan in the amount of $75,221.83, using the $3,778.17 draft as a down payment of the $79,000.00.

3. Respondent's credit was approved.

4. Respondent opened escrow and requested Petitioners to deposit the draft into escrow.

Petitioners refused to deposit the draft into escrow as requested claiming the draft had been misplaced.

This Respondent went to Miami, Florida, the Headquarters of American Bonds Insurance Company to file a Stop Payment on the draft and to have a new draft issued. The Respondent arrived in Miami, Florida, only to find that the draft had been cashed.

When this Respondent returned to Los Angeles and informed the Petitioners of his finding, the Petitioners replied "The draft had been found and sent to Mission Viejo, California, Beverly Hills Savings & Loan Association's Headquarters, for their review."

After waiting for a response from Beverly Hills Savings & Loan for some four (4) months, this Respondent filed a complaint through the State of California Department of Insurance, requesting copies of the draft and shortly thereafter American Bonds Insurance sent this Respondent photocopies of the draft which had been cashed.

ARGUMENT

A judgment or order is not entered within the meaning of Rule 4(a) unless it complies with Rules 58 and 79(a). Fed.R. App. 4(a)(6). The requirements of these rules must be "mechanically applied." United States v. Indrelunas, 411 U.S. 216, 222, 93 S.Ct. 1562, 1565, 36 L.Ed.2d 202 (1973).

In Healy v. Pennsylvania R. Co., 181 F.2d 934 (3rd Cir. 1950), cert. denied, 340 U.S. 935, 71 S.Ct. 490, 95 L.Ed. 674 (1951), the district court filed a memorandum of opinion which concluded with the sentence, "The motions...are denied." The docket entry read:

> April 12, 1949. Memorandum Opinion...denying motion to set aside verdict or for new trial, filed.

The court held that this did not constitute compliance with the separate entry requirement and that Amended Rule 73(a) contemplates both an ORDER and its entry in the docket.

Similarly, in Caperton v. Beatrice Pocahontas Coal Co., 585 F.2d 683 (4th Cir. 1978), the entry of the final judgment itself was defective. The notation on the docket sheet read:

> 9-30-76 Opinion and Order dated 9-26-79 dismissing these four cases for lack of subject matter jurisdiction. CIV. O. B. #33, p. 18. Certified copies hereof mailed to counsel of record.

The court determined that "this notation refers to the district court's tantative opinion, as opposed to any separate judgment..."

In the case before the honorable Court, the entry in the civil docket book is as follows:

3-15-85 sb 18.crt dism actn
reason of settlmnt
& retn jurdctn 60 re-
open if settlmnt not
completed (ENT 3-26-85)
MD JS 6 Mld cpys

Relying on Calhoun v. United States, 647 F.2d 6 (9th Cir. 1981), the 9th Circuit correctly held that "this entry does not show that a separate order was filed and entered as required by Rule 58, but rather that the document entered was the minute of the action taken by the judge at a pretrial conference."

In Beaudry Motor Co. v. ABKO Properties, Inc., 780 F.2d 751 (9th Cir. 1986), relied on heavily by the petitioner, the entry in the civil docket book is as

follows:

1/05 62 M/E(ACM): For reasons set forth in Dft resp to pltf Mots for New Trial and to Amd Cmplt, ORD that Pltf Mots are DENIED.

(cc: Mandig, White, ACM)

In holding that the minute order satisfied the separate document requirement of Rule 58, the court stated that the "copy of the minute order with its language 'IT IS ORDERED' clearly put plaintiff's counsel on notice that an order had been entered..."

In this case, we have a civil minute order without the imperative "IT IS ORDERED." Therefore, the 9th Circuit correctly held that the minute order does not satisfy the requirement of a separate order within the meaning of Rule 58. Consequently, petitioner's writ of certiorari should be denied.

Petitioner correctly points out that Rule 58 was designed "to make the rendition and entry of judgment simple, easy, and prompt" and to remove previous uncertainty about the proper time to appeal or to file post-judgment motions. What he vonceniently failed to point out is that this honorable Court has determined that a mechanical application of Rule 58 will best achieve both laudable objectives of the rule. Moreover, it is only the sloppy procedure of trying to make court minutes suffice for a separate order that unnecessarily raises the issues on this appeal.

For the foregoing reasons, the Petitioners request should be denied with costs.

DATED: June 8, 1990

Respectfully submitted,

MELVIN MEMPHREY CARTER
In Propria Personna

APPENDIX

CONCLUSION

In view of the facts as before mentioned, the Chapter 13 had been approved by the Judge who was presiding over the Bankruptcy Court. Payments were being made as agreed by the Petitioners and the Respondent. It would appear that after the Petitioners proceeded and sold the two properties at 1351 South Burnside Avenue, Los Angeles, California and 1269 East 125th Street, Los Angeles, California, not only did the Petitioners violate the Bankruptcy Code, Section 262, they violated this Respondent's Constitutional Right, guaranteed by the United States Constitution, that "no one shall be deprived of his or her property without due process of law."

It is also clear in the Constitution of the State of California "that no man or woman shall be deprived of his property

without due process of law."

Furthermore, after the petitioners approached the Respondent and the two agreed that Petitioners would resell and Respondent would repurchase the property located at 1351 South Burnside Avenue, Los Angeles, California for the sum of $79,000.00, providing this Respondent would waive his rights to the equity and interest in the amount of $41,000.00, in the property located at 1269 East 125th Street, Los Angeles, California, that the sum of $3,778.00 would be applied toward the purchase price of the Burnside property that the Insurance Company had released to the Petitioners for repairs which the Respondent had made. This amount ($3,778.00) was to be deposited in escrow upon the following germs and conditions: that this Respondent would obtain an F.H.A. loan to compensate the petitioners in the amount of $75,220.00.

This Respondent obtained an appraisal in the amount of $102,000.00 to open escrow on the property located at 1351 South Burnside Avenue, Los Angeles, California. This Respondent's credit was approved and this Respondent requested that the Petitioners deposit the draft in the amount of $3,778.00 into escrow for closing the same.

The Petitioners contended that the draft had been lost or misplaced. This Respondent then went to Miami, Florida, the home office of American Bankers Insurance Company, in order to put a stop payment on the draft in order to expedite the transaction, only to find that the draft had been chashed and the funds had been converted to the Petitioners.

This Respondent requested that the Petitioners replace the draft in the amount of $3,778.00 with a cashier's check. The Petitioners wilfully, intentionally,

deliberately, and without justification or excuse, refused to replace the draft with a cashier's check, and instead called Judge Harry L. Hupp's deputy and informed him that the matter had been settled. Therefore, Judge Harry L. Hupp called the calendar and dismissed the action because the matter had been settled. The Petitioners well knew that the same was a fraud on the Court and the Petitioners did not inform the attorney representing the Respondent of the action and wilfully, intentionally, and deliberately had the Respondent believe that the Petitioners in Mission Viejo, California were reviewing the offer and that the Respondent would be hearing from the Petitioner in a very short time. After waiting for the Petitioners to return the cashier's check in leu of the draft, not knowing that the matter had been dismissed until this Respondent became suspicious because of the

long length of time, this Respondent filed a motion to return this matter back to the State Court and at the hearing this Respondent found that his motion was moot.

This Respondent then filed a motion to reopen the case which was then denied. At that time this Respondent filed his Notice of Appeal. The Ningh Circuit Court of Appeal reversed the matter in favor of the Respondent. Then Petitioners filed a motion for rehearing en banc which was denied.

The stay in the Bankruptcy Court was never removed, nor was it lifted.

THEREFORE, this Respondent requests of this Court that the petiton for a writ of certiorari be denied; that this Court order Petitioners to return the property located at 1351 South Burnside Avenue, Los Angeles, California to Respondent, or in the alternative, this Court demand that the

specific performance be carried out; that the Petitioners return to this Respondent the sum of $41,000.00 for equity and interest that he lost in the property located at 1269 East 125th Street, Los Angeles, California; that the amount of $3,500.00 be returned to this Respondent for the money paid at the time this Respondent entered into the agreement at the Bankruptcy hearing; (that which the Petitioners converted to themselves); for punitive damages at this Court deems proper and fair; and, that this matter be turned over to the proper authorities for a full investigation.

DATED: June 8, 1987

Respectfully submitted,

MELVIN MEMPHREY CARTER
In Propria Personna